No. 149

In the Supreme Court of the United States

OCTOBER TERM, 1941

GREAT NORTHERN RAILWAY COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 60–76) is reported in 32 F. Supp. 651. The opinions of the Circuit Court of Appeals (R. 120–155) are reported in 119 F. (2d) 821.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 8, 1941 (R. 156). The petition for a writ of certiorari was filed on June 9, 1941, and granted on October 13, 1941 (R. 159). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a railroad company has any right, title, or interest in the minerals underlying those portions of its right of way acquired under Section 1 of the Act of March 3, 1875, c. 152, 18 Stat. 482, 43 U. S. C. sec. 934.

STATUTES INVOLVED

The Right of Way Act of March 3, 1875, c. 152, 18 Stat. 482, 43 U. S. C. secs. 934–939, is printed as an appendix, pp. 39–41, *infra*. The provisions of other statutes, as far as relevant, are set out in the argument.

STATEMENT

This is a suit instituted by the United States on March 23, 1939, to enjoin the Great Northern Railway Company[1] from drilling for or removing gas, oil, and other minerals underlying those portions of its right-of-way acquired under Section 1 of the Act of March 3, 1875, c. 152, 18 Stat. 482 (R. 2–7).

The facts alleged by the United States (R. 3–7) and admitted by the Railroad (R. 7–8) are as follows: The Great Northern Railway Company is a railroad corporation, organized under the laws of Minnesota (R. 3). In 1907 the Railroad acquired from the St. Paul, Minneapolis and Manitoba Railway all of the latter's property, including rights-of-way which it had been granted under the

[1] Hereinafter sometimes referred to as the Railroad.

Act of March 3, 1875 (R. 3–4). The complaint further alleged that under the Act of March 3, 1875, the Railroad acquired neither the right to use any portion of the right-of-way for the purpose of drilling for and removing subsurface oil and minerals, nor any right, title, or interest in or to the deposits underlying the right-of-way, but that the oils and minerals remained the property of the United States (R. 4–5); and that although no lease had been issued to the Railroad under the Act of May 21, 1930 (46 Stat. 373), the Railroad claimed ownership of the oils and minerals underlying its right-of-way, and threatened to use the right-of-way to drill for and remove subsurface oil (R. 5).

In its answer the Railroad admitted the allegations of fact, claimed ownership of the subsurface minerals, and affirmatively stated that it proposed to drill three separate oil wells (R. 7–10).[2] The oil from well number one was to be sold commercially; the oil from number two was to be refined, the more volatile portions to be sold and the residue used on its locomotives; and the oil from number three was to be used in its entirety by the Railroad as fuel oil (R. 9).

[2] In 1937 the Railroad had requested the Department of the Interior for an opinion in respect of its rights in the minerals underlying its right of way. That Department concluded that under the granting Act of March 3, 1875, the Railroad acquired "neither the right to use any portion of its right of way for the purpose of drilling for and removing subsurface oil nor any title or interest in or to such oil," 56 I. D. 206, 214 (1937).

On June 2, 1939, the United States filed a motion for judgment on the pleadings (R. 10).

The District Court on April 25, 1940, rendered an opinion holding that the 1875 Act did not convey the minerals to the Railroad (R. 60–76). On July 25, 1940, the court entered a final judgment enjoining the Great Northern Railway Company from drilling for or removing the oil, gas, and other minerals underlying its right of way (R. 99–101).

On appeal by the Railroad (R. 101), the court below, with Judge Wilbur dissenting, affirmed the judgment of the district court (R. 156).

SUMMARY OF ARGUMENT

I

A. An examination of the language of the 1875 Act shows that only an easement was granted. Section 1 refers to "the" right of way; Section 2 refers to "use and occupancy"; and Section 4 requires the location of each right of way to be noted on the plats in the local land office, and provides that "thereafter all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way."[1] As the court below remarked (R. 129), "Apter words to indicate the intent to convey an easement would be difficult to find." Since "nothing passes but what is conveyed in clear and explicit language—

[1] Italics are ours throughout this brief.

inferences being resolved not against but for the Government," it seems patent that the 1875 Act did not convey to the railroads the underlying minerals for fuel or other purposes. *Caldwell* v. *United States,* 250 U. S. 14, 20–21.

B. That the 1875 Act granted to the railroads an easement rather than a fee is further confirmed by the legislative background and history of the Act. The policy of granting land subsidies to the railroads was discontinued in 1871. "Land Grants," 9 Encyclopedia of the Social Sciences (1933), p. 35. Thereafter, the grants were restricted to a mere right of passage across the public domain, a right which could be acquired in no other way while large blocks of lands were held by a sovereign immune from suit. This shift in policy was formally crystallized by congressional resolution in 1872. House Resolution of March 11, 1872, Cong. Globe, 42d Cong., 2d sess., 1585. And the debates preceding the enactment of the 1875 Act show clearly that the grant in the Act was consonant with the new policy of strict limitation and of granting easements rather than fees. Cf. 3 Cong. Rec. pt. 1, p. 407 (1875).

C. Both the subsequent administrative and legislative construction of the 1875 Act reinforce the conclusion that only an easement was granted.

1. Until this Court uttered a contrary dictum in *Rio Grande Ry.* v. *Stringham,* 239 U. S. 44 (1915), the administrative officers of the Govern-

ment consistently construed the 1875 Act as granting an easement rather than a fee. For example, the first general right of way circular of January 13, 1888 (12 L. D. 423, 428) expressly declared that "the Act of March 3, 1875, is not in the nature of a grant of lands; *it does not convey an estate in fee* * * * It is a *right of use* only, the *title* still remaining in the United States." Essentially similar statements are to be found in the railroad right of way regulations of March 21, 1892 (14 L. D. 338, 342), November 4, 1898 (27 L. D. 663, 664), February 11, 1904 (32 L. D. 481, 482–483), and May 21, 1909 (37 L. D. 787, 788). The contemporaneous decisions of the Land Department likewise refer to the 1875 grant as a "mere easement" (19 L. D. 588, 590), as "an incorporeal hereditament, an easement and not the land" (20 L. D. 131, 132), as "in the nature of a mere easement" (32 L. D. 33, 34). And, as this Court has said on more than one occasion, "the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." *United States* v. *Johnston,* 124 U. S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Brewster* v. *Gage,* 280 U. S. 327, 336.

2. Congress, too, has construed the 1875 Act as granting an easement rather than a fee. For

example, the Acts of June 26, 1906, c. 3550, 34 Stat. 482, and February 25, 1909, c. 191, 35 Stat. 647, declaring a forfeiture of unused rights of way, state that the lands covered thereby shall be "freed and discharged from *such easement.*" Such clear-cut legislative pronouncements on the meaning of the 1875 Act are aids to the construction of that Act. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *United States* v. *Freeman*, 3 How. 556, 564–565; *McFadden* v. *Mountain View Min. & Mill. Co.*, 97 Fed. 670, 677 (C. C. A. 9, 1899); *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526, 533–534.

D. Because of the distinctive language in the 1875 Act, and also because of the sharp change in congressional policy in 1871, cases construing grants made prior to 1871 as vesting a fee in the railroads are without force. These important differences between the 1875 Act and the earlier land grant acts were not called to this Court's attention in *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44 (1915), a case in which the Government and private owners were not represented. Hence, the statement there made, by way of dictum, that the railroads have a "limited fee" in rights of way acquired under the 1875 Act should be reexamined. A repudiation of that dictum by a decision holding that the 1875 Act grants the railroads an easement rather than a fee will not disturb land titles; it will merely restore a rule of property which existed between 1875 and 1915, the period

during which most of these rights of way were acquired.

II

But even if it be determined that the Railroad has a "limited fee" in its right of way, it does not necessarily follow that such a "fee" includes the right to extract oil and other minerals. The purposes of Congress are accomplished if the grant is held to be a "fee" in the surface and so much of the subsurface as is necessary for support—a "fee" for a railroad thoroughfare exclusively. Cf. *Western Union Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540, 570. Since such an interest would accomplish the purposes of Congress, this is the largest interest which the applicable rules of construction will permit to pass under the Act. *Caldwell* v. *United States*, 250 U. S. 14, 20–21. Under such a construction the railroad is restricted in the use of the land except as a railroad thoroughfare. The right to use and extract minerals is a use of the land not permitted to the railroad. Cf. *Union Missionary Baptist Church* v. *Fyke*, 179 Okla. 102; *Jordan* v. *Goldman*, 1 Okla. 406, 453.

ARGUMENT

I

THE RIGHT OF WAY GRANTED BY THE ACT OF MARCH 3, 1875, IS IN THE NATURE OF AN EASEMENT

Introduction.—The present suit was instituted by the Government in order to obtain a determi-

nation of the nature and scope of the grant made by the Act of March 3, 1875. Until recently, the question whether the 1875 Act conveyed an absolute fee, a limited fee, or simply a surface easement was not of great practical consequence, since under any of the theories the Railroad's control of the surface was complete, and only the surface rights were of importance. But with the recent discovery of oil in Glacier County, Montana, close to the Railroad's right of way, the more precise nature and scope of the 1875 grant has become a matter of considerable importance not only to the Great Northern and other railroads with similar grants, but also to the Government and other owners of land adjacent to the railroad rights of way.

To resolve the question, the Railroad, in 1937, requested the Department of the Interior for an opinion respecting its rights to the minerals underlying its right of way. The Department concluded that the Act of March 3, 1875, conveyed no right to use the right of way in order to drill and remove subsurface oil and title or interest in such oil. 56 I. D. 206, 214 (1937). The Railroad, however, declared its intention to commence drilling operations notwithstanding the decision (R. 5), and reasserted its claim and intention in its answer to the Government's complaint (R. 9). With the Government's allegations of fact admitted by the Railroad (R. 7–10), the motion for judgment on the pleadings (R. 10)

thus presented the single question of law whether the Right of Way Act of March 3, 1875, granted to the Railroad the subsurface minerals.[4]

A. *The language of the 1875 Act shows that only an easement was granted.*—Section 1 of the Act does not grant "a" right of way. It grants "the" right of way through the public lands of the United States. This language, while not conclusive, would seem to indicate that Congress intended to grant the incorporeal "right" to lay tracks across the public domain and not a corporeal "strip of land." That Congress was granting the railroads the right to use and occupy the public lands, and not the lands themselves, is further evidenced by the language of Section 2, which declares that any railroad whose right of

[4] Many legal subdivisions crossed by railroad rights of way have since been patented to homesteaders, stock-raisers, and miners. This fact suggests an additional question whether these subsequent patentees have not thereby succeeded to the mineral rights of the Government in the lands thus patented. But inasmuch as the United States still owns thousands of acres of unpatented land along the Great Northern and other railroad rights of way, it is in a position to litigate the scope of the 1875 Act without raising at this time the legal effect of particular patents in specific cases (R. 134–136). It may be said in passing that the solution to the question whether the Government's mineral rights in particular parcels have passed to individual patentees will depend on the language of the statute under which the patent was issued, on the classification of the land at the time the patent was issued, and on the nature of the interest which this Court ultimately decides was granted to the railroads under the 1875 Act.

way passes through a canyon, pass, or defile, "shall not prevent any other railroad company from the *use and occupancy* of the said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located." In other words, the Act confers a right of "use and occupancy" which in some instances must be shared "in common" with other railroads.

Finally, and significantly, Section 4 requires the location of each right of way to be noted on the plats in the local land office, and "thereafter all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way." To construe the right of way grant as a fee in the land would be to rob this provision of all meaning. It surely would have been novel, as well as wholly unnecessary, for Congress, after it granted a fee, to declare that the adjacent lands are to be conveyed "subject to" the prior grant in fee. As the court below pointed out, apter words to indicate an intent to convey an easement would be difficult to find (R. 129).

That this was, in fact, the precise intent of Section 4 is clear. Congressman Slater, in discussing the reason why the Public Lands Committee had inserted a similar clause in a special right of way bill under consideration in 1872, said:

> Mr. SLATER. The point [of this clause] is simply this: the land over which this right of way passes is to be sold subject to the right of way. It simply provides that

this right of way *shall be an incumbrance upon the land for one hundred feet* upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way.

Mr. SPEER of Pennsylvania. It grants no land to any railroad company?

Mr. SLATER. No, sir.[5]

The 1875 Act becomes a harmonious whole if Section 1 be construed as conferring on the railroads an easement; to construe it as granting a fee would be to deprive this provision of Section 4 of all meaningful content.

Even were the words of the Act of 1875 less clear, it is well settled that any ambiguity in a grant is to be resolved in favor of the sovereign grantor.[6] This rule is applicable to the 1875 Act. *Caldwell* v. *United States*, 250 U. S. 14, 20–21; *United States* v. *Minidoka & S. W. R. Co.*, 190 Fed. 491, 494 (C. C. A. 9, 1911). In the *Caldwell* case, the appellants contended that the 1875 grant of timber for railroad construction included the refuse or tie slash from felled trees. In rejecting that interpretation, this Court said (pp. 20–21):

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[5] Cong. Globe, 42d Cong., 2d Sess., 2137 (1872).

[6] *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 326; *Sioux City &c. Railroad* v. *United States*, 159 U. S. 349, 360; *Wisconsin Central R'd* v. *United States*, 164 U. S. 190, 202; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 545–546.

> The contention of appellants encounters the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the Government and that *nothing passes but what is conveyed in clear and explicit language*—inferences being resolved not against but for the Government. *Wisconsin Central R. R. Co.* v. *United States*, 164 U. S. 190; *United States* v. *Oregon & California R. R. Co.*, 164 U. S. 526. * * *
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> The rule, it seems to us, is particularly applicable. There was a grant of timber by the Act of March 3, 1875, not of trees, but of timber for purposes of railroad construction, *not as a means of business or of profit;* nor could it be made an element, as contended, of compensation to the agents employed to cut it.

If the timber grant in the 1875 Act does not include tie slash, there seems to be no reason why the right of way grant should be construed to include subsurface minerals. The rule of "liberal construction" for which petitioner contends (Pet. 23–25) is applicable only when necessary to carry out the *purposes* of the Act. Cf. *United States* v. *Denver &c. Railway*, 150 U. S. 1, 14; *Nadeau* v. *Union Pacific R. R. Co.*, 253 U. S. 442, 444. Plainly, in an act designed to permit railroads to lay their tracks across the public lands of the United States, it is not necessary to construe a right of way grant as

including fuel oil for railroad locomotives (cf. Pet. 43–44).[7]

Nor can it be argued that railroads, in order to operate efficiently, must have a fee in their rights of way. Petitioner conceded in its brief in the court below (p. 61) that railroads, when they condemn land for rights of way, "do not acquire mineral rights or full fee ownership." If the railroads do not need a fee in those portions of their rights of way acquired by eminent domain proceedings, and the courts have so held,[8] the need for a fee in those portions of their right of way acquired under the 1875 Act is no more compelling. Hence, it scarcely can be said that the *purpose* of the 1875 grant will be frustrated if it be construed as conveying an easement rather than a fee. This will merely give to the grant the same meaning which is commonly given to deeds conveying a right of way for railroad purposes.[8a]

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[7] Cf Circular Instructions of August 29, 1885, 4 L. D. 150, 151, stating that "no public timber is permitted to be taken or used [under the 1875 Act] for *fuel* by any railroad company." And, of course, Congress could hardly have intended in 1875 to give oil to the railroads since oil as locomotive fuel was then unknown.

[8] E. g. *Quick* v. *Taylor*, 113 Ind. 540, 542 (1887); *Railroad Co.* v. *Schmuck*, 69 Kan. 272, 276–277 (1904); *Keown* v. *Brandon*, 206 Ky. 93 (1924); *Hall* v. *Boston & Maine Railroad*, 211 Mass. 174, 176 (1912); *Roberts* v. *Sioux City & P. R. Co.*, 73 Nebr. 8, 14 (1905); *Washington Cemetery* v. *P. P. & C. I. R. R. Co.*, 68 N. Y. 591 (1877).

[8a] The weight of authority supports the view that railroads acquire only an easement and not a fee where the granting clause of the deed declares the purpose of the grant to be a right of way for a railroad. See *Magnolia Petroleum*

B. *The legislative background and history of the 1875 Act show that the grant was of an easement rather than a fee.*—

1. The year 1871 marks the end of one era and the beginning of a new in American land-grant history. In that year the policy of lavish grants of land to encourage railroad construction was replaced by a new policy of severe restriction of federal munificence in respect of railroads. It is in the light of this shift that the Act of 1875 must be read, for it is well recognized that railroad grants "are to receive such a construction as will carry out the intent of Congress," and to ascertain that intent courts "must look to the condition of the country when the acts were passed." *Winona & St. Peter R. R. Co.* v. *Barney,* 113 U. S. 618, 625; *United States* v. *Denver &c. Railway,* 150 U. S. 1, 14; *Minidoka & S. W. R. Co.* v. *Weymouth,* 19 Idaho 234 (1911). "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *United States* v. *Union Pacific R. R. Co.,* 91 U. S. 72, 79; *Smith* v. *Townsend,* 148 U. S. 490, 494.

That there was a marked change in land-grant policy in 1871 is not open to dispute. The first important grant of public lands for railroad purposes was made to the Illinois Central in 1850.[9] During the next two decades "there passed into the hands

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Co. v. *Thompson,* 106 F. (2d) 217, 227 (C. C. A. 8), and cases there cited, reversed on other grounds 309 U. S. 478.

[9] Act of September 20, 1850, c. 61, 9 Stat. 466.

of western railroad promoters and builders a total of 158,293,000 acres, an area equaling that of the New England states, New York, and Pennsylvania combined."[10] The largest of these grants (40,000,000 acres) was made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365. That Act, in addition to providing a 400-foot right of way from Lake Superior to Puget Sound, also granted the alternate odd-numbered sections of public lands for 40 miles on each side of the railroad, with indemnity provisions for lands already sold, homesteaded, pre-empted, or otherwise disposed of. It is thus apparent that Congress in 1864 was willing to grant lands in "almost any amount"[11] to encourage the construction of transcontinental railroads. Faced with such an open-handed congressional policy, the courts have construed such early grants as conveying to the railroads a fee in their rights of way."[12]

But there was soon a public reaction against such legislative beneficence. In the late '60's land reformers began to condemn land grants "as inconsistent with the free homestead idea."[13] The abuses accompanying the lavish land grant policy

[10] "Land Grants," 9 Encyclopaedia of the Social Sciences (1933), p. 35.

[11] Statement by Representative Thaddeus Stevens during the debates on the Northern Pacific Bill, Cong. Globe, 38th Cong., 1st sess., 1698 (1864).

[12] *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, 271. See *infra*, pp. 30–31.

[13] "Land Grants to Railways," 3 Dictionary of American History (1940), p. 237.

of the two previous decades finally became "so numerous and so apparent that land grants as a form of subsidizing internal improvements ceased with 1871."[14] The public sentiment promptly found congressional expression in the following Resolution adopted by the House of Representatives on March 11, 1872:

> *Resolved,* That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.[15]

Although unwilling after 1871 to make outright grants of land to private railroad companies, Congress did not wish to paralyze the development of an integrated system of railroads. And since the Government had not yet disposed of vast areas of land in the West, paralysis of development would have resulted had Congress refused to permit the railroads to lay their tracks across

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[14] "Land Grants," 9 Encyclopaedia of the Social Sciences (1933), p. 35; see also Bogart, *Economic History of the United States* (3d ed., 1918), p. 351.

[15] Cong. Globe, 42d Cong., 2d Sess., 1585 (1872). Cf. H. Rep. No. 10, 43d Cong., 2d Sess. (1874), p. 1 (Ser. No. 1656): "The Committee on the Public Lands, having considered the bill (H. R. 2732) to grant lands to aid in the construction of a railroad in the State of Alabama, are of opinion that *new*

the public lands of the United States.[16] To meet this situation the Forty-second and Forty-third Congresses (1871–1875) passed a number of special acts granting to designated railroads simply "the right of way" through the public lands of the United States.[17] And finally in 1875, in order to avoid the need for special legislation for each new railroad, Congress enacted the General Right of Way Statute involved in the instant case. The one purpose of that Act was to grant to the railroads a right of passage across the public domain, a right which could be acquired in no other way while large blocks of land were held by a sovereign immune from suit.

2. The debates preceding the enactment of the 1875 Act establish that the congressional intention, previously formulated, was to confer upon the rail-

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grants of land for building railroads ought not to be made, and therefore beg leave to report back the bill with the recommendation that it do not pass" (the bill reported on did not pass). That a similar policy prevailed in the Senate during this period is evident from the following statement by Senator Stewart during the debate on the Great Salt Lake and Colorado Railroad right-of-way bill (Cong. Globe, 42d Cong., 2d Sess., 4162 (1872)): "We were formerly in the habit of granting lands to aid in the building of railroads in the States and Territories. We have abandoned that policy." See also Cong. Globe, 42d Cong., 2d Sess., 2543 (1872); 3 Cong. Rec., pt. 1, 404 (1875).

[16] Cf. Cong. Globe, 42d Cong., 2d sess., 1591 (1872).

[17] Act of April 12, 1872, c. 96, 17 Stat. 52; Act of May 23, 1872, c. 205, 17 Stat. 159; Act of May 27, 1872, c. 220, 17 Stat. 162, 163; Act of June 1, 1872, c. 258, 17 Stat. 202; Act of June 1, 1872, c. 261, 17 Stat. 212; Act of June 4, 1872, c. 293, 17 Stat. 224; Act of June 7, 1872, c. 323, 17 Stat.

roads a mere right of passage rather than a strip of land. The statement by Mr. Hawley of Illinois is typical:

> It *simply and only* gives the right of way. It merely grants to such railroad companies as may be chartered the *right* to lay their tracks and run their trains *over* the public lands; it does nothing more.[18]

The Railroad contends (Pet. 27–28) that the force of these statements is weakened since, it is said, the character of the estate granted was not under discussion; and the statements were directed simply to assurances that the Act did not also grant a federal franchise or charter.[19] But it is significant that the same observations were repeatedly made during the debates on the special right-of-way statutes enacted between 1872 and 1875, in which the question of federal charters was wholly absent. For example, in reporting a bill granting a right-of-way to the Dakota Grand

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280; Act of June 8, 1872, c. 354, 17 Stat. 339; Act of June 8, 1872, c. 359, 17 Stat. 340; Act of June 8, 1872, c. 364, 17 Stat. 343; Act of June 10, 1872, c. 437, 17 Stat. 393: Act of March 3, 1873, c. 291; 17 Stat. 612; Act of June 20, 1874, c. 348, 18 Stat. 130; Act of June 23, 1874, c. 473, 18 Stat. 274; Act of February 5, 1875, c. 35, 18 Stat. 306.

[18] 3 Cong. Rec., pt. 1, p. 407 (1875). See also the statements of Mr. Hoar (pp. 404, 406).

[19] But cf. 2 Cong. Rec., pt. 3, p. 2898 (1874), where Senator Stewart, in commenting on the Senate version which included a franchise provision, stated that the "bill grants the right of way *simply*." And compare the statement of Mr. Hoar opposing the proposal to give the states power to

Trunk Railway Company,[20] the committee chairman said: "This is merely a grant of the right of way."[21] Likewise, in reporting a right-of-way bill for the New Mexico and Gulf Railway Company,[22] Mr. Townsend of Pennsylvania (the same Congressman who sponsored the Right of Way Act of March 3, 1875) observed: "It is nothing but a grant of the right of way."[23] Such statements, coupled with Mr. Slater's declaration (*supra*, pp. 11–12) of the purpose of the "subject to" clause, warrant the conclusion that Congress intended to grant the railroads an easement rather than a fee.

C. *Subsequent administrative and congressional construction confirm that only an easement was granted.*—

1. It is an established rule that "the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not

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regulate railroad rates. Mr. Hoar insisted that the proposal was invalid since "if the right of way were granted over the public land the title to which belongs to the United States and is vested in the United States, *so that the title consists in the ownership by the United States of the soil, and the use of it by the corporation*, it is very doubtful whether the State has authority, if disposed, to require changes in the rates" (3 Cong. Rec., pt. 1, p. 404 (1875)).

[20] Act of June 1, 1872, c. 258, 17 Stat. 202.

[21] Cong. Globe, 42d Cong., 2d Sess. 3913 (1872).

[22] Act of June 8, 1872, c. 364, 17 Stat. 343.

[23] Cong. Globe, 42d Cong., 2d Sess. 4134 (1872). For other similar statements, see Cong. Globe, 42d Cong., 2d Sess. 2138, 2543 (1872).

be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." *United States* v. *Johnston* 124 U. S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Brewster* v. *Gage,* 280 U. S. 327, 336. Departmental circulars and regulations are especially persuasive. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315; *Swendig* v. *Washington Co.,* 265 U. S. 322, 331; *McFadden* v. *Mountain View Min. & Mill. Co.,* 97 Fed. 670, 677 (C. C. A. 9); *Taggart* v. *Great Northern Ry. Co.,* 208 Fed. 455, 460 (E. D. Wash. 1912), affirmed 211 Fed. 288 (C. C. A. 9).[24]

The earliest and most nearly contemporaneous administrative construction of the 1875 Act confirms that the Railroad was granted an easement rather than a fee. The first general right of way circular of January 13, 1888, stated (12 L. D. 423, 428):

> The act of March 3, 1875, is not in the nature of a grant of lands; *it does not convey an estate in fee,* either in the "right of way" or the grounds selected for depot pur-

[24] Petitioner suggests (Pet. 41) that the administrative interpretations are irrelevant since they follow the Act of 1875 by at least 13 years. But the rule relating to the weight to be given to administrative construction is not dependent on strict contemporaneity. Cf. *Swendig* v. *Washington Co., supra,* where the statute preceded the administrative construction by 11 years.

> poses. It is a *right of use* only, the *title* still remaining in the United States. * * *
>
> All persons settling on public lands to which a railroad right of way has attached, take the same *subject to* such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases.[25]

These same provisions are repeated in the right of way regulations of March 21, 1892, 14 L. D. 338, 342. The next revisions of November 4, 1898 (27 L. D. 663, 664), and of February 11, 1904 (32 L. D. 481, 82) disclose slight changes in phraseology but the basic thought is the same.[26] In the departmental regulations of May 21, 1909, appeared perhaps the clearest of statements relating to the interests acquired under the 1875 Act (37 L. D. 787, 788):

> 1. *Nature of grant.*—A railroad company to which a right of way is granted *does not secure a full and complete* title to the land on which the right of way is located. It obtains only the *right to use* the land for the purposes for which it is granted and for no

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[25] Cf. Circular of June 27, 1900, 30 L. D. 325, 327, which uses similar language in describing the canal and reservoir rights of way granted by the Act of March 3, 1891, c. 561, sec. 18, 26 Stat. 1101.

[26] The changes in phraseology, especially those in the 1904 regulations, seem directly traceable to language used by this Court in describing a *land grant* right-of-way. *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267 (1903). Cf. *Melder* v. *White*, 28 L. D. 412 (1899), which also defined the Northern Pacific right-of-way as a base or qualified fee.

> other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the *fee simple title* in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and *such patentee takes the fee,* subject only to the railroad company's right of use and possession. All persons settling on a tract of public land, to part of which right of way has attached, take the same subject to such right of way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. * * *

And the departmental regulations thus construing the Act of 1875 are further confirmed by decisions of the Land Department in which the 1875 grant has been construed as a "mere easement," as "an incorporeal heriditament, an easement and not the land," as "in the nature of a mere easement," as "merely an easement," and similar phrases.[27]

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[27] 19 L. D. 588, 590 (1894); 20 L. D. 131, 132 (1895); 32 L. D. 33, 34 (1903); 35 L. D. 495 (1907); 44 L. D. 552, 556 (1916). Patents issued to settlers on lands crossed by railroad rights-of-way have consistently included the entire legal subdivision, generally with a notation that it was issued "subject to" the right-of-way. See 4 L. D. 523, 524 (1884); 8 L. D. 115, 120 (1889); 19 L. D. 386, 388 (1894); 20 L. D. 131 (1895); 23 L. D. 67 (1896); 26 L. D. 77 (1898); 27 L. D. 430 (1898); 29 L. D. 478 (1900); 32 L. D. 33 (1903); 46 L. D. 429 (1918). Similarly it has been held that the railroads do not acquire a fee in, but only the use of, 20

It is plain, then, that the 1875 Act was contemporaneously construed by the Department of the Interior in its right of way circulars and its decisions as merely granting to the railroads a right to "use and occupy" the land for railroad purposes, with the fee remaining in the United States or its subsequent grantees. These are the regulations and the decisions which were in force when the Great Northern Railway Company and other non-land-grant railroads in the West acquired their rights of way across the public lands of the United States.

It is true that this uniformity of interpretation was broken in 1915 on the heels of the decision in

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acres for their station grounds. 4 L. D. 523 (1884); 4 L. D. 525 (1886); 32 L. D. 311 (1903); 35 L. D. 495 (1907); cf. Circular Instructions of March 9, 1878, 5 Copp's Land-Owner 35, 36 (1878), requiring proper affidavits to be filed before a company "may obtain the use" of grounds for station purposes; see also Circular Instructions of November 7, 1879, 6 Copp's Land-Owner 141, 144–148, 155 (1879). Petitioner's suggestion (Pet. 41) that the administrative construction loses force because of a supposed failure to discriminate between the grant of the Act of 1875 and similar granting acts, on the one hand, and the pre-1871 acts on the other, is not justified. Thus, for example, in 28 L. D. 412 (1899), Assistant Attorney General Van Devanter described the Northern Pacific (1864) right-of-way as "a base or qualified fee," but at the same time recognized that the special Act of July 4, 1884, c. 179 (23 Stat. 73), granted "only an easement." And in 32 L. D. 33, 34 (1902), he likewise observed that it was "well established that the right of way through the public lands granted to railroads" under the 1875 and similar acts was "in the nature of a mere easement."

Rio Grande Ry. v. *Stringham*, 239 U. S. 44.[28] But this administrative construction after 1915 cannot be deemed binding upon the Department of Interior since it was impelled by the apparent (although, we urge, erroneous) compulsions of the *Stringham* case. *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Helvering* v. *Hallock*, 309 U. S. 106, 121. And in any event, earlier decisions, being more nearly contemporaneous with the 1875 statute and evidencing a long-continued and uniform construction until 1915, are a more reliable index of the legislative intent and are accordingly more persuasive.[29] *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

2. This Court has frequently recognized that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*,

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[28] Compare 14 L. D. 105 (1892), 35 L. D. 495 (1907), and 45 L. D. 473 (1916) with 51 L. D. 27, 305 (1925), 51 L. D. 131 (1925), 51 L. D 604 (1926), 53 I. D. 270 (1931), and 53 I. D. 339, 340 (1931).

[29] It should also be noted that, at least indirectly, the earlier administrative construction received congressional approval and adoption. By the Act of March 3, 1891, c. 561 (26 Stat. 1101), Congress granted canal and reservoir companies rights of way across the public domain, and in doing so repeated the language of the 1875 Act. And by the Act of March 6, 1896, c. 42 (29 Stat. 44), Congress made the 1875 Act partially applicable to the Colville Indian Reservation. These statutes are, in effect, legislative reenactments of the 1875 Act, and as such may be said to constitute adoption

221 U. S. 286, 309; *Cope* v. *Cope*, 137 U. S. 682, 687. "* * * if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman*, 3 How. 556, 564–565. Or, as the Ninth Circuit has tersely put it, "the legislative construction of its own act is always potent." *McFadden* v. *Mountain View Min. & Mill. Co.*, 97 Fed. 670, 677.

An examination of subsequent legislation plainly reveals that Congress has construed the 1875 Act as granting an easement rather than a fee. For example, the Act of June 26, 1906, c. 3550, 34 Stat. 482, declaring a forfeiture of unused rights of way, provides:

> *Be it enacted* * * * That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the [1875] Act * * * where such railroad has not been constructed

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of the intervening administrative construction. See *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493; *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273. The situation is not substantially different from that presented in the *National Lead* case, *supra*, in which this Court held that congressional extension of the usual tariff drawback provision to another commodity constituted implied legislative approval of the administrative interpretation of the drawback provisions then in force in respect of other articles.

> and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby *freed and discharged from such easement*, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds * * *.[30]

On this same day Congress enacted another statute confirming the rights of way which certain railroads had acquired under the 1875 Act in the Territories of Oklahoma and Arizona. Act of June 26, 1906, c. 3548, 34 Stat. 481. The committee reports, explaining the purpose of this legislation, contain the following pertinent description of the 1875 Act:

> The right as originally conferred and as proposed to be protected by this bill simply grants *an easement or use* for railroad purposes. Under the present law wherever the railroad passes through a tract of public land the entire tract is patented to the settler or entryman, *subject only to this easement.*

[30] The same language is repeated in the forfeiture Act of February 25, 1909, c. 191, 35 Stat. 647.

> The present bill does not in any way enlarge the nature of the right conferred.[21]

And finally the Act of May 21, 1930, c. 307, 46 Stat. 373, 30 U. S. C. sec. 301, states that:

> Whenever the Secretary of the Interior shall deem it to be consistent with the public interest he is authorized to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee [e. g. Northern Pacific right-of-way?] or a mere easement [e. g. Great Northern right-of-way?] * * *

While this 1930 statute loses some of its probative value by reason of the fact that it was enacted 55 years after the 1875 Act was passed and also because it may have been influenced by the dictum in the *Stringham* case, we submit that the 1906 statutes are subject to no such infirmities. Especially are these earlier statutes pertinent since they are approximately contemporaneous with the acquisition by the Great Northern and its predecessor of large segments of its present right of way. See Record pp. 4, 7; see also, *Taggart* v. *Great Northern Ry. Co.*, 208 Fed. 455, 457 (E. D. Wash.), affirmed 211 Fed. 288 (C. C. A. 9). Statutes enacted between the time a grant is made and the time it takes effect may be considered in

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[21] H. Rept. No. 4777, 59th Cong., 1st Sess., p. 2 (Ser. No. 4908); cf. Sen. Rept. No. 1417, 59th Cong., 1st Sess., p. 2 (Ser. No. 4904).

determining the scope of the original grant. *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526, 533–534. And this is true even though the subsequent statutes modify the original grant, which is not the fact in the instant case. Hence, if the phrase "right of way" was theretofore ambiguous, the 1906 statutes remove the ambiguity and make it clear that the 1875 Act granted an easement and nothing more.[32]

D. *Summary.*—In short, the language of the 1875 Act with its "subject to" proviso, when read in connection with the legislative purpose of the statute and the then prevailing congressional land-grant policy, and when viewed in the light of its subsequent administrative and legislative construction, establishes that the Act should also be construed by the courts as granting the railroads an easement rather than a fee in their rights of way. If the foregoing analysis of the 1875 statute be correct, it will follow as of course that the subsurface minerals were not conveyed to the railroads.

Petitioner in advancing the contrary contention relies for the most part upon a series of decisions of this Court (Pet. 29–33) arising under the railroad right of way and land grants of 1850–1871. Petitioner urges that, since the 1875 Act is sub-

[32] In addition, as we have noted above (*supra*, p. 26, n. 29) there has been an implied legislative endorsement of the administrative construction by virtue of partial reenactment.

stantially identical to the pre-1871 grants, it should be identically construed (Pet. 34–36).

None of these cases involved the issue whether the railroads' rights, whatever their precise nature, include title to subsurface minerals.[33] And in any event, we submit that petitioner's argument based on these cases fails because it disregards the essential differences between the 1875 Act and its predecessors. These differences rest, as we have noted, in the distinctive language of the 1875 grant (*supra*, pp. 10–12) and in the sharp change in congressional land-grant policy in 1871 (*supra*, pp. 15–19). No provision comparable to the "subject to" clause of Section 4 of the 1875 Act is to be found in the land-grant acts of 1850–1871; its appearance coincides with the establishment of the new legislative policy.[34]

But even if the language of the 1875 Act were identical with that of the 1850–1871 grants, which it is not, the legislative background warrants a con-

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[33] Petitioner states (Pet. 4, 29) that *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, "involved a question whether the railway company could enjoin the removal of minerals underlying its [granted] right of way strip." The railroad had, however, instituted a suit to quiet title to its right of way; the defendant's claim to the land derived solely from his purchase of *surface* rights from a placer mine patentee. See *infra*, pp. 32–33.

[34] The "subject to" provision first appeared in the Portland, Dallas and Salt Lake right of way Act of April 12, 1872, 17 Stat. 52.

struction of the 1875 Act different from the earlier grants. For it is plain, and this Court has so held,[35] that the meaning of words in a grant varies according to the time and circumstances of their utterance. And, as we have pointed out (*supra*, pp. 15–19), the time and circumstances of the 1875 grant were in sharp contrast to those of the grants between 1850 and 1871.

It is true that this Court in *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, 47, stated that the interest granted by the Act of 1875 was "neither a mere easement, nor a fee simple absolute, but a limited fee." But that statement was not necessary to the decision and is not decisive of the instant

[35] An unreserved grant of swamp land has been held to include a grant of mineral lands (*Work* v. *Louisiana*, 269 U. S. 250), while an unreserved grant of school lands was held not to pass title to mineral lands lying in the section described in the grant (*United States* v. *Sweet*, 245 U. S. 563). The Court in *Work* v. *Louisiana* expressly distinguished the *Sweet* case on the ground that at the time of the grant there in controversy, there was a settled congressional policy of reserving mineral lands, while there was no such settled policy at the time of the grant considered in *Work* v. *Louisiana* (pp. 258–259). The Court also distinguished the *Sweet* case on the ground that there was, in respect of the grant involved in *Work* v. *Louisiana*, no settled departmental construction of the swamp land Acts and no subsequent congressional interpretation (p. 259). Both these factors are present in the instant case (*supra*, pp. 21–29). And compare the *Sweet* case with *Cooper* v. *Roberts*, 18 How. 173, where the grant of school lands was held to pass title to mineral lands. Here again, the Court distinguished identical grants in part on the ground of a shift in legislative policy. See the *Sweet* case at p. 574. Cf. *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526, 533–534.

case. In the *Stringham* case, the plaintiff railroad brought suit to quiet title to a strip of land acquired by it under the 1875 Act. Defendants asserted title to the same strip of land by virtue of a purported purchase of surface rights from a placer mine claimant. *Rio Grande Ry.* v. *Stringham,* 38 Utah 113, 116, 110 Pac. 868. 869–870 (1910). The Supreme Court of Utah reversed the judgment of the trial court, and remanded the case with a direction "to enter a judgment awarding to the plaintiff title to a right of way over the lands in question." The trial court accordingly entered judgment declaring plaintiff to be the owner of the right of way. The plaintiff again appealed, asserting that it should have been adjudged "owner in fee simple of the right of way over the premises." *Rio Grande Ry.* v. *Stringham,* 39 Utah 236, 115 Pac. 967 (1911). The Supreme Court of Utah affirmed the judgment of the trial court on the ground that the plaintiff should have sought its remedy by petitioning for a rehearing of the earlier case. The plaintiff thereupon brought up both judgments to this Court by writ of error. This Court held that the writ of error addressed to the second judgment presented nothing reviewable (p. 47). It affirmed the first judgment since it "describes the right in the exact terms of the Right-of-Way Act and evidently uses those terms with the same meaning they have in the act" (p. 48).

It is, therefore, clear that the issue now before this Court was not squarely presented in the *Stringham* case, since the defendant claimed only a surface right which conflicted with the plaintiff's surface right, and since, further, the only issue before this Court was the accuracy of the language utilized in the first judgment. And, in any event, this Court's conclusion that the plaintiff was owner of a "limited fee" was based (p. 47) entirely on cases arising under the land-grant acts passed prior to 1871 and containing no requirement that the lands "over which" the right of way passed should thereafter be disposed of "subject to such right of way." These important differences in the land grant acts and the Right of Way Act were not called to the Court's attention.[16] No brief was filed by the defendant in that case, by the United States or by the other owners of land crossed by these rights of way (p. 45).

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[16] In this connection it is worth noting that in two early cases decided at a time when the 1871 change in legislative policy was a matter of common knowledge, this Court described two similar Acts as merely granting an easement. For example, in *Railway Co.* v. *Alling*, 99 U. S. 463, 475 (1878), it was held that the Act of June 8, 1872, c. 354, 17 Stat. 339, granted to the Denver and Rio Grande Railway Company "a present beneficial easement." Chief Justice Waite, in a dissenting opinion (p. 482), described it as "no more than a license to enter upon and use" the unappropriated public lands. In *Smith* v. *Townsend*, 148 U. S. 490, 498–499, the Court declared that the Southern Kansas Railway Company and its successors, under the Act of July 4, 1884, c. 179, 23 Stat. 73, "had simply an easement, not

In these circumstances we submit that the statement in the *Stringham* case is not controlling.[37] And the question is one of sufficient importance to the railroads, to the Government, and to the other owners of lands crossed by these rights of way to warrant an examination *de novo*.

No settled rule of property will be disturbed by a repudiation of the dictum in the *Stringham* case. In fact, as we have shown (*supra*, pp. 21–25), a decision construing the 1875 Act as granting an easement rather than a fee will merely restore a rule of property which existed between 1875 and 1915. And since it was during that period that the Great Northern Railway Company acquired its present

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a fee in the land", that "the fee continued in the Indians," "all that the company received was a mere right-of-way", and that "doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract *subject to the easement of the company;* and if ever the *use* of that right of way was abandoned by the railroad company the *easement* would cease, and the *full title* to that right-of-way would vest in the patentee of the land." Such statements, made by this Court as early as 1878, refute petitioner's contention "that prior to and during the period of the Congressional grants, the idea that a railroad might be built upon an easement had hardly been thought of" (Pet. 13). See also *East Alabama Railway Company* v. *Doe*, 114 U. S. 340, 350 (1885); *Hazen* v. *Boston and Maine Railroad*, 2 Gray 574, 580 (1854); *Blake* v. *Rich*, 34 N. H. 282, 283–284, 288–289 (1856).

[37] In two subsequent cases where the 1875 grant is described as a limited fee, the statements are merely dicta based on the *Stringham* case. *Choctaw, O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531, 538; *Noble* v. *Oklahoma City*, 297 U. S. 481, 494.

right of way, no hardship is wrought upon the Railroad if the construction that the grant conveyed an easement rather than a fee be reaffirmed.

II

EVEN IF THE RIGHT OF WAY IS A "LIMITED FEE," IT DOES NOT FOLLOW THAT THE RAILROAD OWNS THE MINERALS

We have urged (*supra*, pp. 32–35) that this Court's statement in the *Stringham* case that the right of way granted in the 1875 Act is a "limited fee" on an implied condition of reverter be not regarded as decisive of the instant case. But even adherence to that definition of the right of way does not impel the conclusion that such a "fee" includes the right to extract oil and minerals. The expression "limited fee" may be used to describe the *duration* of a particular estate or interest (e. g. the duration of an *easement*), or it may be employed to describe the *use* to which an estate may be put (e. g. "for church purposes only").

In none of its decisions has this Court defined the term "limited fee."[38] But the Circuit Court of Appeals for the Eighth Circuit, in *United States* v. *Big Horn Land & Cattle Co.*, 17 F. (2d) 357, has construed these words as defining the *duration* of the *easement*. That court, after adverting to a similar statement by Justice Van Devanter in *Kern River Co.* v. *United States*, 257 U. S. 147, 152,

[38] Nor has the Court, as we have pointed out (*supra*, p. 30), determined the issue whether whatever the nature of the railroad's interest, the grant includes title to subsurface minerals.

that the "right of way intended by the [Canal and Reservoir Right of Way] act was neither a mere easement nor a fee simple absolute, but a *limited fee* on an implied condition of reverter," said (p. 365):

> Of course it is clear that Mr. Justice Van Devanter used the expression "mere easement" in its restricted sense, implying little more, if any, than a license, for it is well settled that an easement may include a fee * * *.
>
> A *fee* may exist in an incorporeal hereditament, and may, of course, under this principle, exist in an *easement.* * * * *Branson* v. *Studabaker,* 133 Ind. 147, 165, 33 N. E. 98.
>
> We think it, therefore, not important whether the interest or estate passed be considered an easement or a limited fee. In any event it is a limited fee in the nature of an easement.

It is well settled that an easement may be held in fee determinable. 2 Tiffany, *Real Property* (2d ed. 1920), p. 1228; 1 Washburn, *Real Property* (6th ed. 1902), sec. 146, p. 74; Jones, *Easements* (1898) sec. 16, p. 14; *Hall* v. *Turner,* 110 N. C. 292, 304, 14 S. E. 791 (1892); *Oswald* v. *Wolf,* 126 Ill. 542, 548, 19 N. E. 28 (1888); *Branson* v. *Studabaker,* 133 Ind. 147, 164, 33 N. E. 98 (1892); *Nellis* v. *Munson,* 108 N. Y. 453, 461, 15 N. E. 739 (1888).

The mere fact that the right of way has some of the attributes of a fee—"perpetuity and exclu-

sive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property"—does not require the conclusion that the right of way is not an easement. *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 183; *Western Union Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540, 570. The purposes of Congress are accomplished if the grant is held to be a "fee" in the surface and so much of the subsurface as is necessary for support—a "fee" for a railroad thoroughfare exclusively. Since such an interest would accomplish the purposes of Congress, this is the largest interest which the applicable rules of construction will permit to pass under the Act (*supra*, pp. 12–15). Under such a construction the Railroad is restricted in the use of the land except as a railroad thoroughfare. The right to use and extract minerals is a use of the land not permitted to the railroad. *Union Missionary Baptist Church* v. *Fyke*, 179 Okla. 102 (1937); *Jordan* v. *Goldman*, 1 Okla. 406, 453 (1891).

Hence, even though the Act be construed as granting the railroads a "limited fee" in their rights of way, it does not follow that the railroads acquired any rights in the subsurface minerals.

CONCLUSION

If the Right of Way Act of March 3, 1875, be construed as granting the railroads an easement rather than a fee in their rights of way, which we believe to be the correct construction, it necessarily

follows that these railroads have no right, title, or interest in the minerals underlying their rights of way. Even if the Act be construed as granting the railroads a limited fee in their rights of way, this "fee" does not include subsurface minerals. It therefore follows that the judgment of the court below should be affirmed.

Respectfully,

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JANUARY 1942.

APPENDIX

Act of March 3, 1875, c. 152, 18 Stat. 482, 43 U. S. C., secs. 934–939:

CHAP. 152. An act granting to railroads the right of way through the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any

other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved, March 3, 1875.

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 149.—October Term, 1941.

Great Northern Railway Company, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 2, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

We are asked to decide whether petitioner has any right to the oil and minerals underlying its right of way acquired under the general right of way statute, Act of March 3, 1875, c. 152, 18 Stat. 482.

The United States instituted this suit to enjoin petitioner from drilling for or removing gas, oil and other minerals so situated, and alleged in its complaint substantially that petitioner, in 1907, acquired from the St. Paul, Minneapolis and Manitoba Railway all of the latter's property, including rights of way granted it under the Act of March 3, 1875, a portion of which crosses Glacier County, Montana; that petitioner acquired neither the right to use any portion of such right of way for the purpose of drilling for or removing subsurface oil and minerals, nor any right, title or interest in or to the deposits underlying the right of way, but that the oil and minerals remained the property of the United States; and, that although no lease had been issued to petitioner under the Act of May 21, 1930, 46 Stat. 373, petitioner claimed ownership of the oil and minerals underlying its right of way and threatened to use the right of way to drill for and remove subsurface oil.

Petitioner admitted certain allegations of fact, denied the allegation that title to the oil and minerals was in the United States, and asserted that it proposed to drill three separate oil wells—the oil from the first to be sold commercially, that from the second to be refined, the more volatile parts to be sold and the residue to be used on petitioner's locomotives, and that from the third to be used in its entirety by petitioner as fuel.

Pursuant to a motion therefor by the United States, judgment was rendered on the pleadings and petitioner was enjoined from "using the right of way granted under the Act of March 3, 1875,

18 Stat. 482, for the purpose of drilling for or removing oil, gas and minerals underlying the right of way". The Circuit Court of Appeals affirmed. 119 F. 2d 821. The importance of the question and an asserted conflict with *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, moved us to grant certiorari. 314 U. S. —.

The Act of March 3, 1875, from which petitioner's rights stem, clearly grants only an easement, and not a fee. Section 1 indicates that the right is one of passage since it grants "the", not a, "right of way through the public lands of the United States". Section 2 adds to the conclusion that the right granted is one of use and occupancy only, rather than the land itself, for it declares that any railroad whose right of way passes through a canyon, pass or defile "shall not prevent any other railroad company from the *use and occupancy* of said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located".[1]

Section 4 is especially persuasive. It requires the location of each right of way to be noted on the plats in the local land office, and "thereafter all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way".[2] This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee. As the court below pointed out, "Apter words to indicate the intent to convey an easement would be difficult to find". That this was the precise intent of Section 4 is clear from its legislative history.[3] While Section 4 provides a method for securing the benefits of the Act in advance of construction,[4] no adequate reason is advanced for believing that it does not illumine the nature of the right granted. The Act is to be interpreted as a harmonious whole.

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[1] Emphasis added.

[2] Emphasis added.

[3] This clause first appeared in a special right of way statute, Portland, Dalles, and Salt Lake Act of April 12, 1872, 17 Stat. 52. Congressman Slater reported that bill for the Public Lands Committee, and, in discussing the reason for the clause, said:

> Mr. SLATER: The point [of this clause] is simply this: the land over which this right of way passes is to be sold subject to the right of way. It simply provides that this right of way shall be an incumbrance upon the land for one hundred feet upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way.
>
> Mr. SPEER of Pennsylvania: It grants no land to any railroad company?
>
> Mr. SLATER: No, sir. [Cong. Globe, 42d Cong., 2d Sess., 2137 (1872).]

[4] The right of way may be located by construction. Dakota C. R. Co. v. Downey, 8 L. D. 115; Jamestown and Northern Rd. Co. v. Jones, 177 U. S. 125; Stalker v. Oregon Short Line, 225 U. S. 142.

The Act is to be liberally construed to carry out its purposes. *nited States* v. *Denver, &c. Railway,* 150 U. S. 1, 14; *Nadeau* v. *nion Pacific R. R. Co.,* 253 U. S. 442; *Gt. Northern Ry.* v. *Steinke,* 61 U. S. 119. But the Act is also subject to the general rule of onstruction that any ambiguity in a grant is to be resolved fav- rably to a sovereign grantor—"nothing passes but what is con- eyed in clear and explicit language"—*Caldwell* v. *United States,* 50 U. S. 14, 20-21, and cases cited. Cf. *Gt. Northern Ry.* v. *teinke, supra.* Plainly there is nothing in the Act which may be haracterized as a "clear and explicit" conveyance of the under- ying oil and minerals. The Act was designed to permit the con- truction of railroads through the public lands and thus enhance heir value and hasten their settlement. The achievement of that urpose does not compel a construction of the right of way grant s conveying a fee title to the land and the underlying minerals; railroad may be operated though its right of way be but an asement.[5]

But we are not limited to the lifeless words of the statute and ormalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and, "courts, in onstruing a statute, may with propriety recur to the history of he times when it was passed". *United States* v. *Union Pacific R. R. Co.,* 91 U. S. 72, 79. And see *Winona & St. Peter RR. Co. . Barney,* 113 U. S. 618, 625; *Smith* v. *Townsend,* 148 U. S. 490, 494; *United States* v. *Denver, &c. Railway,* 150 U. S. 1, 14.

Beginning in 1850 Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain.[6]

[5] In Railway Co. *v.* Alling, 99 U. S. 463; and Smith *v.* Townsend, 148 U. S. 490, statutory rights of way were held to be but easements. And, it has been held that railroads do not have a fee in those portions of their rights of way acquired by eminent domain proceedings. See East Alabama Railway Company *v.* Doe, 114 U. S. 340; Quick *v.* Taylor, 113 Ind. 540; Railroad Co. *v.* Schmuck, 69 Kan. 272; Keown *v.* Brandon, 206 Ky. 93; Hall *v.* Boston & Maine Railroad, 211 Mass. 174; Roberts *v.* Sioux City & P. R. Co., 73 Nebr. 8; Washington Cemetery *v.* P. P. & C. I. R. R. Co., 68 N. Y. 591.

[6] Typical were the Illinois Central Grant, Act of September 20, 1850, c. 61, 9 Stat. 466; Union Pacific Grant of July 1, 1862, c. 120, 12 Stat. 489; Amended Union Pacific Grant, Act of July 2, 1864, c. 216, 13 Stat. 356; and Northern Pacific Grant, Act of July 2, 1864, c. 217, 13 Stat. 365. This last grant was the largest, involving an estimated 40,000,000 acres. In view of this lavish policy of grants from the public domain it is not surprising that the rights of way conveyed in such land-grant acts have been held to be limited fees. Northern Pacific Ry. Co. *v.* Townsend, 190 U. S. 267. Cf. Missouri, Kansas & Texas Ry. Co. *v.* Roberts, 152 U. S. 114.

This policy incurred great public disfavor[7] which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:

"*Resolved*, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law." Cong. Globe, 42d Cong., 2d Sess., 1585 (1872).

After 1871 outright grants of public lands to private railroad companies seem to have been discontinued.[8] But, to encourage development of the Western vastnesses, Congress had to grant rights to lay track across the public domain, rights which could not be secured against the sovereign by eminent domain proceedings or adverse user. For a time special acts were passed granting to designated railroads simply "the right of way" through the public lands of the United States.[9] That those acts were not intended to convey any land is inferable from remarks in Congress by those sponsoring the measures. For example, in reporting a bill granting a right of way to the Dakota Grand Trunk Railway (17 Stat. 202), the committee chairman said: "This is merely a grant of the right of way".[10] Likewise, in reporting a right of way bill for the New Mexico and Gulf Railway Company (17 Stat. 343), Mr. Townsend of Pennsylvania, the same Congressman who sponsored the Act of 1875, observed: "It is nothing but a grant of the right of way".[11]

The burden of this special legislation moved Congress to adopt the general right of way statute now before this Court. Since it was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone min-

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[7] See "Land Grants", 9 Encyclopedia of the Social Sciences (1933), p. 35; "Land Grants to Railways", 3 Dictionary of American History (1940), p. 237.

[8] *Ibid.* And see H. Rept. No. 10, 43d Cong., 2d Sess. (1874), p. 1 (Ser. No. 1656) recommending that a bill to grant lands to aid in the construction of a railroad not pass. See also the remarks of Mr. Dunnell in reporting a special right of way bill for the Public Lands Committee, Cong. Globe, 42d Cong., 2d Sess., 2543 (1872), and those of Mr. Townsend, who was in charge of the bill which became the Act of 1875, in reporting to the House the Senate bill and the House substitute. Cong. Rec., 43d Cong., 2d Sess., Vol. 3, pt. 1, 404 (1875).

[9] The Forty-second and Forty-third Congresses (1871-1875) passed at least fifteen such acts.

[10] Cong. Globe, 42d Cong., 2d Sess., 3913 (1872).

[11] Cong. Globe, 42d Cong., 2d Sess., 4134 (1872). See also p. 2543.

ral riches. The presence in the Act of Section 4, which, as has een pointed out above, is so inconsistent with the grant of a fee, trongly indicates that Congress was carrying into effect its changed olicy regarding railroad grants.[12]

Also pertinent to the construction of the Act is the contemoraneous administrative interpretation placed on it by those harged with its execution. Cf. *United States* v. *Johnson,* 124 . S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315. The first such nterpretation, the general right of way circular of January 13, 888, was that the Act granted an easement, not a fee.[13] The same osition was taken in the regulations of March 21, 1892, 14 L. D. 38, and those of November 4, 1898, 27 L. D. 663. While the first f these circulars followed the Act by 13 years, the weight to be ecorded them is not dependent or strict contemporaneity. Cf. *wendig* v. *Washington Co.,* 265 U. S. 322. This early adminstrative gloss received indirect Congressional approval when Conress repeated the language of the Act in granting canal and reseroir companies rights of way by the Act of March 3, 1891, c. 561, 6 Stat. 1101, and when Congress made the Act of 1875 partially pplicable to the Colville Indian Reservation by Act of March 6, 896, c. 42, 29 Stat. 44. Cf. *National Lead Co.* v. *United States,* 52 U. S. 140, 146.

The circular of February 11, 1904, 32 L. D. 481, described the ight as a "base or qualified fee". This shift in interpretation as probably due to the description in *Northern Pacific Ry.* v. *'ownsend,* 190 U. S. 267, of a right of way conveyed in a landrant act (13 Stat. 365) as a "limited fee, made on an implied ondition of reverter".[14] But the earlier view was reasserted in he departmental regulations of May 21, 1909, 37 L. D. 787.[15] fter 1915 administrative construction bowed to the case of *Rio*

[12] See note 3, *ante.*

[13] "The act of March 3, 1875, is not in the nature of a grant of lands; does not convey an estate in fee, either in the 'right of way' or the grounds lected for depot purposes. It is a right of use only, the title still remaining the United States. . . . .

"All persons settling on public lands to which a railroad right of way has tached, take the same subject to such right of way and must pay for the ll area of the subdivision entered, there being no authority to make deducons in such cases." 12 L. D. 423, 428.

[14] See note 6, *ante.*

[15] The decisions of the Lands Department construing the 1875 Act are in cord. Fremont, Elkhorn and Missouri Valley Ry. Co., 19 L. D. 588; ary G. Arnett, 20 L. D. 13.; John W. Wehn, 32 L. D. 33; Grand Canyon r. Co. v. Cameron, 35 L. D. 495.

Grande Ry. v. *Stringham*, 239 U. S. 44, which applied the language of the *Townsend* case to a right of way acquired under the Act of 1875. We do not regard this subsequent interpretation as binding on the Department of the Interior since it was impelled by what we regard as inaccurate statements in the *Stringham* case. Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 121.

Congress itself in later legislation has interpreted the Act of 1875 as conveying but an easement. The Act of June 26, 1906, c. 3550, 34 Stat. 482, declaring a forfeiture of unused rights of way, provides in part that: "the United States hereby resumes the full title to the lands covered thereby [by the right of way] freed and discharged from such easement". This language is repeated in the forfeiture act of February 25, 1909, c. 191, 35 Stat. 647. Also on June 26, 1906, an act[16] was passed confirming the rights of way which certain railroads had acquired under the 1875 Act in the Territories of Oklahoma and Arizona. The House committee report on this bill said: "The right as originally conferred and as proposed to be protected by this bill simply grants an easement or use for railroad purposes. Under the present law whenever the railroad passes through a tract of public land the entire tract is patented to the settler or entryman, subject only to this easement".[17] It is settled that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309. See also *Cope* v. *Cope*, 137 U. S. 682; *United States* v. *Freeman*, 3 How. 556. These statutes were approximately contemporaneous with petitioner's acquisition of the rights of way of the St. Paul, Minneapolis and Manitoba Railway.

That petitioner has only an easement in its rights of way acquired under the Act of 1875 is therefore clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments.

Petitioner, seeking to obviate this result, relies on several cases in this Court stating that railroads have a "limited", "base", or "qualified" fee in their rights of way.[18] All of those cases, except

[16] 34 Stat. 481.

[17] H. Rept. No. 4777, 59th Cong., 1st Sess., p. 2 (Ser. No. 4908); cf. S. Rept. No. 1417, 59th Cong., 1st Sess., p. 2 (Ser. No. 4904).

[18] Butts v. Northern Pacific Railroad, 119 U. S. 55; Clairmont v. United States, 225 U. S. 551; Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114; M. K. & T. Ry. v. Oklahoma, 271 U. S. 303; New Mexico v. United States Trust Co., 172 U. S. 171; Northern Pacific Ry. v. Townsend, 190 U. S.

Rio Grande Ry. v. *Stringham*, 239 U. S. 44, *Choctaw, O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531; and *Noble* v. *Oklahoma City*, 297 U. S. 481, deal with rights of way conveyed by land-grant acts before the shift in Congressional policy occurred in 1871. For that reason they are not controlling here.[19] When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act. And, in none of those acts was there any provision comparable to that of Section 4 of the 1875 Act that "lands over which such right of way shall pass shall be disposed of subject to such right of way". None of the cases involved the problem of rights to subsurface oil and minerals.

In the *Stringham* case it was said that a right of way under the Act of 1875 is "neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee". The railroad had brought suit to quiet title to a portion of its right of way. Stringham asserted title to that portion by virtue of a purported purchase of surface rights from a placer mine claimant. The Supreme Court of Utah reversed the judgment of the trial court and remanded the case, directing the entry of "a judgment awarding to the plaintiff title to a right of way over the lands in question". 38 Utah 113; 110 P. 868. The railroad again appealed, asserting that it should have been adjudged "owner in fee simple of the right of way over the premises". The Supreme Court of Utah affirmed the judgment of the trial court on the ground that the railroad's proper remedy was by petition for rehearing of the first appeal. 39 Utah 236, 115 P. 967. Both judgments were brought to this Court by writ of error. It was held that the second judgment presented nothing reviewable. The first judgment was affirmed since it "describes the right of way in the exact terms of the right-of-way act, and evidently uses those terms with the same meaning they have in the act."

The conclusion that the railroad was the owner of a "limited fee" was based on cases arising under the land-grant acts passed

267; United States v. Michigan, 190 U. S. 379; Northern Pacific Railway Co. v. Ely, 197 U. S. 1; Rio Grande Ry. v. Stringham, 239 U. S. 44; Choctaw, O. & G. R. R. Co. v. Mackey, 256 U. S. 531; Noble v. Oklahoma City, 297 U. S. 481.

[19] See note 6, *ante*.

prior to 1871 and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention.[20] That conclusion is consistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in *Choctaw, O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531, and *Noble* v. *Oklahoma City*, 297 U. S. 481, that the 1875 Act conveyed a limited fee are dicta based on the *Stringham* case and entitled to no more weight than the statements in that case. Far more persuasive are two cases involving special acts granting rights of way, passed after 1871 and rather similar to the general act of 1875.[21] *Railway Co.* v. *Alling*, 99 U. S. 463, characterized the right so granted as "a present beneficial easement" and *Smith* v. *Townsend*, 148 U. S. 490, referred to it as "simply as an easement, not a fee". We think that the Act of 1875 is to be similarly construed.

Since petitioner's right of way is but an easement, it has no right to the underlying oil and minerals. This result does not freeze the oil and minerals in place. Petitioner is free to develop them under a lease executed pursuant to the Act of May 21, 1930, 46 Stat. 373.

During the argument before this Court it was fully developed that the judgment was rendered on the pleadings in which petitioner denied the allegation of title in the United States, and there was no proof or stipulation that the United States h any title. On this state of the record the United States was not enitled to any judgment below. However, we permitted the parties to cure this defect by a stipulation showing that the United States has retained title to certain tracts of land over which petitioner's right of way passes, in a limited area,[22] and that petitioner intended to drill for and remove the oil underlying its right of way over each of those tracts. Accordingly the judgment will be modified and limited to the areas described in the stipulation. As so modified, it is

Affirmed.

Mr. Justice ROBERTS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[20] No brief was filed by the defendant or the United States.

[21] 17 Stat. 339; 23 Stat. 73.

[22] Lots 1, 2 and 3, Sec. 12; lots 1, 4, 5, 9 and 10, Sec. 13, T. 29 N., R. 15 W., Montana Meridian, all being within the exterior boundaries of the Glacier National Park; NW¼ SE¼ Sec. 28; NW¼ Sec. 29; NE¼ NW¼ Sec. 30; NE¼ Sec. 34, T. 32 N., R. 24 E., Montana Meridian.